(1)

Supreme Court, U.S.
FILED

03 156 JUL 22 2003

No.

In the
Supreme Court of the United States

Edward Lachman
Petitioner

v.

Bill Wietmarschen
C. Eric Crowe
Respondents

On Petition for Writ of Certiorari
to the Ohio Municipal Court of Hamilton County

PETITION FOR WRIT OF CERTIORARI

Edward Lachman
Petitioner in search of Counsel
87 Juergens Ave.
Cincinnati, Ohio 45220
513-861-7746

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33 pp

QUESTIONS PRESENTED FOR REVIEW

May a person who had been improperly joined to a federal case over which a district court has no personam jurisdiction, be later presumed by a state court to have been a properly joined federal party?

May a federal case over which the district court had no personam jurisdiction with regard to improperly joined parties, be later presumed by a state court to have been fully litigated by them for the purpose of deciding res judicata?

May a barred person in a federal case for federal statutory claims, who had been barred from joining on grounds of exceeding the statue of limitations, be later barred on grounds of res judicata in a state court after timely filing a common law trespass claim arising out of the same events?

When deciding res judicata, may a state court impute subject matter jurisdiction to a federal court where it would not have had any such jurisdiction?

May a litigant in propria persona be denied equal protection of federal law when a state court fails to resolve federal issues raised in a timely manner, either by failing to certify those issues with a federal court, or failing to conduct other required procedures sua sponte on its own initiative rather than upon motion?

CITATIONS OF (UN)OFFICIAL REPORTS OF OPINIONS & ORDERS ENTERED IN THIS CASE

Municipal Court of Hamilton County
(case No 01cv29469)
Order of Reference to Magistrate: 2001.12.19
Magistrate's Decision: 2002.2.8
Entry Approving the Decision of the Magistrate: 2002.2.27
Judgment Entry: 2002.2.28
Decision Denying Motion to Strike: 2002.4.1

First District Court of Appeals of Ohio
(case No c020208)
Judgment Entry: 2002.12.6
Decision Overruling Application for Reconsideration: 2003.1.10

Supreme Court of Ohio
(case No 03-0127)
Entry: 2003.4.23

BASIS FOR JURISDICTION

Review of the Magistrate's Decision entered on 8 February 2002 is sought in regard to the federal issues. It was affirmed by every successive level of the judicial system of the State of Ohio. Each level avoided addressing the federal issues that were raised in various manners. Jurisdiction to review the Magistrate's Decision on a writ of certiorari is conferred on this Court by 28 U.S.C. §1257.a, firstly for having drawn into question the validity of 28 U.S.C. §1359.

Review is further sought over the issue of whether a federal court could have jurisdiction for a common law tort of trespass where there is no diversity of jurisdiction, the property is private and is not on federal territory. The Municipal Court's ruling that res judicata could apply where there was a lack of subject matter

jurisdiction (in addition to the lack of personam jurisdiction) in a federal court, would presume that a federal court could have had judicial power over matters that are reserved to the States, and so draw into question the validity of the 10th Amendment.

Review is also sought for failure of the Municipal Court to grant Petitioner his right to equal protection by certifying the federal issues with the federal district court that had barred the Petitioner from joinder, or by any other procedure it should have performed sua sponte, where such failure could thereby draw into question the validity of the 14th Amendment.

CONSTITUTIONAL PROVISIONS & FEDERAL STATUTES INVOLVED

The 10th Amendment.
The 14th Amendment.
28 U.S.C. §1359
28 U.S.C. §1257(a)

STATEMENT OF THE CASE

This case arose from Petitioner's complaint in the Ohio Municipal Court of Hamilton County for common law trespass on his property by Respondents Wietmarschen and Crowe, who forcibly entered his home, and did not identify themselves to the Petitioner, in violation of the knock and announce rule, and searched his home for his son without a search warrant on 14 November 1997. It was alleged that the Respondents tortured his son (apparently on the grounds that he was an Islamic terrorist and should be handled accordingly as prescribed to them by federal guidelines and training), and that such mistreatment of his son annulled any other authority that the Respondents had to be on the petitioner's property, and thereby were trespassing.

In November 2001, the Petitioner sued the Respondents in Hamilton County Municipal Court, for

common-law trespass, on the theory that they had committed an aggravated trespass which annulled any authority they had to be on his property. Municipal Judge Mattingly assigned the case upon "Defendants' Motion for Summary Judgment" to Magistrate Wolf for a report on all related issues of law and fact, as required by Ohio Civil Rule 53.E.1.

In Part 6 of Plaintiff's Motion to Strike Defendants' motion, Petitioner raised at least one of facts of a prior federal complaint in connection with the federal issues sought for review: "neither of the current Defendants is named, nor is the current Plaintiff named as a party to the original complaint, nor were any of these names added prior to 14 November 1999, when the statute of limitations expired." At the same time Petitioner submitted an Affidavit that stated in Item 9: "I did not join any complaint to a federal civil rights action before the expiration of the associated 2-year statute of limitations on 14 Nov. 1999, nor did I name any of the current Defendants before that time".

Magistrate Wolf then held a hearing and failed to report on all related issues of law as required by Ohio Civil Rule 53.E.1, and as ordered in Judge Mattingly's Order of Reference. The subsequent Magistrate's Decision reached conclusions of federal law such that the Petitioner may be presumed to have been a properly joined "party to the action in Federal Court," or that "The complaint in this action has already been litigated in United States District Court", such that said federal court may be presumed to have had jurisdiction over the Parties, as well as the same subject matter of trespass.

Magistrate Wolf instead relied on the unsworn testimony of the Respondents' counsel that the Petitioner had been properly joined to the federal case, and that the District court would have had jurisdiction over Petitioner's state common-law trespass cause of action. As attached to Defendants' Motion for Summary Judgment, the District court's order states that the

Petitioner had not been properly joined, nor was there ever any claim of federal jurisdiction over the state common law tort of trespass on private property. Magistrate Wolf failed to certify any such issues of federal law or fact with the federal court, which was required of her, since she lacked jurisdiction to issue conclusions of federal law, and there were no precedents in case law which were controlling on the Petitioner's unique situation.

Furthermore, Magistrate Wolf failed to conduct, as provided for by Ohio Civil Rule 16 (2) & (4), "all procedures necessary" for any "simplification of the issues" and for any "necessity of amendments to the pleadings" which could remove defects as alleged by the Respondents to be in Petitioner's Complaint, and so allow a subset of issues alleged in the Complaint to proceed to trial. Magistrate Wolf also failed to consider and report on Affidavits filed by the Petitioner, which showed that the Petitioner was not properly joined to the federal suit, and also showed that there were genuine issues of fact material to a common law tort cause of action for trespass, in order to preclude summary judgement.

The rubber-stamping is most evident by the fact that Judge Mattingly issued an Order to Approve the Magistrate's Decision to recommend that summary judgement be granted to the Respondents before issuing a decision on Plaintiff's "Motion to Strike" or on Plaintiff's "Verified Objection to Magistrate's Decision" which cited the federal issues as their grounds.

As a result of the foregoing derelictions of duty with regard to due process, the Petitioner was denied equal protection with regard to all issues of law. The Court of Appeals failed to remedy these omissions in its initial judgment entry, and failed to cite any federal case law in support of its decision. The Petitioner then submitted an Application for Reconsideration which explicitly addressed at least one of the federal issues of law sought

for review, and not just implicitly via reference in the Appellant's Brief to Petitioner's Motions and Objections in the Record of the Municipal Court. The Court of Appeals then issued a Decision Overruling an Application for Reconsideration. The Petitioner then filed an appeal to the Ohio Supreme Court, and explicitly addressed at least one of the federal issues of law sought for review in his Memorandum In Support of Jurisdiction. The Ohio Supreme Court issued an Entry that declined to hear Petitioner's case for lack of jurisdiction and dismissed the case.

ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

In this case, the Ohio Municipal Court of Hamilton County decided issues of federal law that has not been, but should be settled by this Court. On the one hand, the Municipal Court imputed powers of jurisdiction to the federal courts that rightly belong to state courts. On the other hand, the Petitioner was denied Equal Protection of the Laws, by not having issues of federal law certified with the relevant federal district court, when such procedure was implicitly required by the Ohio Civil Rules of Procedure, and specified by the Municipal Court Judge in an Order of Reference to the Magistrate. The legislative history of 28 U.S.C. 1359 shows that Congress intended to protect the people from the consequences of improper joinder. As a result of the decision of the District Court, the Respondents had been granted such protection with regard to the earlier federal case, while as a result of the decisions in this case in the Ohio courts, the Petitioner has been denied the same protection.

APPENDIX
(provisional: to be superseded by Joint Appendix)

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

EDWARD LACHMAN
Plaintiff
vs.
BILL WIETMARSCHEN
ET AL.
Defendants

CASE NO. 01CV29469
JUDGE ELIZABETH MATTINGLY

ORDER OF REFERENCE TO MAGISTRATE

It appearing to the Court that no jury demand has been filed herein and that the amount in controversy is less than $5,000, it is hereby ordered that, pursuant to Civil Rule 53, this action be and it is hereby referred to the Court Administrator for assignment to one of the duly appointed magistrates of this Court for trial and report to the Court on all issues of law and fact in the within action.

The Administrator shall assign this action for setting before a magistrate on the first available date for hearing and report within 90 days of assignment.

s/_____
JUDGE ELIZABETH MATTINGLY
Date: December 19, 2001

Copies mailed to:

Edward Lachman
87 Juergens Ave.
Cincinnati, Ohio 45220

David T. Stevenson, Esq.
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2151
--

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

EDWARD LACHMAN
Plaintiff
vs.
BILL WIETMARSCHEN
C. ERIC CROWE
Defendant.

CASE NO. 01CV29469

MAGISTRATE'S DECISION

This cause came to be heard on the defendant's Motion for Summary Judgment on the 8th day of January, 2002, in the Civil Division of the Hamilton County Municipal Court. Both parties were present and presented arguments on the Motion.

The complaint in this action has already been litigated in the United States District Court. This is clearly set forth in the defendant's Motion for Summary Judgment and copies of the prior complaint and decision by Magistrate Hogan are attached. In this hearing the plaintiff argued that he was not a party of the action in Federal Court, however a copy of the prior complaint demonstrated that Edward Lachman was a party in the prior case. Therefore, Edward Lachman is barred from attempting to relitigate his claim in this Court.

I therefore recommend defendant's Motion for Summary Judgment is granted.

Copies of this decision have been mailed to the parties or their counsel. Unless written objections to this decision are filed and served within 14 days of the date of its filing, the decision may become the order of the Court.

s/_____
Ellen T. Wolf, Magistrate
Hamiton County Municipal Court
February 5, 2002

Order:
Notice Mailed
to Parties
On: 2.8.02
Int M
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HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

Entered
FEB 28 2002
Image 223

EDWARD LACHMAN
Plaintiff
vs.
BILL WIETMARSCHEN
C. ERIC CROWE
Defendant

CASE No. 01CV29469

ENTRY APPROVING THE DECISION OF THE MAGISTRATE

ORDERED that the Decision of the Magistrate be approved; that the findings of fact set forth therein are adopted as the finds of fact of the Court; and that the recommendations contained therein are adopted as the order of the Court.

s/___(Mattingly)___
Judge Municipal Court
2-27-02
DATE

Order:
Notice Mailed
to Parties
On: 3.1.02
Int M
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HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

Entered
FEB 28 2002
Image 224

EDWARD LACHMAN
Plaintiff(s)
vs.
BILL WIETMARSCHEN
C. ERIC CROWE
Defendant(s)

CASE No. 01CV29469

JUDGMENT ENTRY

x The objections to the Magistrate's Decision are overruled
(Check if applicable)

x The decision of the Magistrate is adopted and judgement is hereby rendered as follows:
(Restate the recommended judgment)

Defendant's Motion for Summary Judgment is granted.

s/___(Mattingly)___
Judge Municipal Court
2-28-02
DATE

Order:
Notice Mailed
to Parties
On: 3.1.02
Int M
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HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

Entered
APR 01 2002
Image 193

EDWARD LACHMAN
Plaintiff
vs.
BILL WIETMARSCHEN
ET AL.
Defendants

CASE NO. 01CV29469
JUDGE ELIZABETH MATTINGLY

DECISION DENYING MOTION TO STRIKE

This matter came on for decision on Plaintiff's Motion to Strike following entry of Summary Judgment in favor of Defendants on February 8, 2002. For good cause shown, Plaintiff's Motion to Strike is denied.

SO ORDERED this 29th day of March, 2002.

s/_____
JUDGE ELIZABETH MATTINGLY

Copies mailed to:

Edward Lachman
87 Juergens Ave.
Cincinnati, Ohio 45220

David T. Stevenson, Esq.
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2151

Order:
Notice Mailed
to Parties
On: 4.1.02
By: KA
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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

EDWARD LACHMAN,
Plaintiff-Appellant,
vs.
BILL WIETMARSCHEN
and

C. ERIC CROWE,
Defendants-Appellees.

APPEAL No. C-020208
TRIAL No. 01CV-29469

DECISION

PRESENTED TO THE CLERK
OF COURTS FOR FILING
DEC 06 2002
COURT OF APPEALS

Civil Appeal From: Hamilton County Municipal Court
Judgment Appealed From Is: Affirmed
Date of Judgment Entry on Appeal: December 6, 2002

Edward Lachman, pro se,
Michael K. Allen, Hamilton County Prosecuting Attorney, Richard P. Gabelman and David T. Stevenson for Appellees.

Please note: We have removed this case from the accelerated calendar.

OHIO FIRST DISTRICT COURT OF APPEALS

PAINTER, Presiding Judge.

{¶1} Plaintiff-appellant, Edward Lachman, appeals the trial court's grant of summary judgment for defendants-appellees, Bill Wietmarschen and C. Eric Crowe. The trial court held that previous litigation by Lachman against Wietmarschen and Crowe in federal district court barred Lachman from attempting to relitigate his claim in a different court. We affirm.

{¶2} The underlying dispute in Lachman's claim involved the arrest of Lachman's son, Max, by Wietmarschen and Crowe, who are adult probation officers of the Hamilton County Court of Common Pleas. In November 1997, Common Pleas Court Judge Nadel issued an arrest warrant for Max Lachman, on account of his probation violations, and Wietmarschen and Crowe arrested Max Lachman at his father's home.

{¶3} In 2000, Lachman joined a suit against Wietmarschen and Crowe in the United States District Court for the Southern District of Ohio under federal and state law, alleging false arrest, use of excessive force causing bodily injury, and intentional infliction of emotional distress. In January 2001, the district judge dismissed the Lachmans' complaint, finding that the two-year statute of limitations had run and that the complaint was time-barred.

{¶4} In November 2001, Edward Lachman sued Wietmarschen and Crowe in Hamilton County Municipal Court, for trespass. The municipal judge assigned the case to a magistrate for trial and for a report on all issues of law and fact. The magistrate held a hearing and decided that the complaint had been previously litigated in federal district court, meaning that Lachman was barred from attempting to relitigate his claim in the municipal court. The judge adopted the magistrate's recommendations and granted Wietmarschen's and Crowe's motion for summary judgment. Lachman now raises 12 assignments of error.

{¶5} In his first assignment of error, Lachman claims that the trial court erred by allowing a hearing on the motion for summary judgment when it was not properly filed according to Civ.R. 56(B). Civ.R. 56(B) provides, "If the action has been set for pretrial of trial, a motion for summary judgment may be made only with leave of court."

{¶6} The record reflects that Wietmarschen and Crowe did not seek leave of court prior to filing their

motion for summary judgment, even though a trial date had already been set. But a court may, in its sound discretion, consider a motion for summary judgment that has been filed, without the express leave of the court, after the action has been set for trial. Furthermore, where the acceptance of a motion occurs by the grace of the court, the decision to accept is itself "by leave of court." Therefore, though Wietmarschen and Crowe did not make a format request for leave of court, the fact that the court acknowledged their motion and set a hearing date shows that retroactive leave to file was granted.

{¶7} We cannot reverse the trial court's decision to accept the motion without showing an abuse of discretion. An abuse of discretion occurs if the trial court's decision is unreasonable, arbitrary, or unconscionable. A decision is unreasonable if it is unsupported by a sound reasoning process. We conclude that the trial court's acceptance of the motion was not unreasonable. Accordingly, Lachman's first assignment of error is overruled.

{¶8} In his second through seventh assignments of error, Lachman argues that the trial court errored by not granting his motion to strike Wietmarschen and Crowe's summary judgment motion, both because it was a "sham" and because of the procedural error we have already discussed. Lachman asserts that the trial court also errored by not striking all four legal arguments made by Wietmarschen and Crowe in their motion, because the arguments were based on fraudulent premises.

{¶9} Civ.R. 12(F) provides that a court may strike any "insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter." Whether to grant or deny a motion to strike rests in the sound discretion of the trial court, and the court's decision will be disturbed on appeal only for an abuse of discretion.

{¶10} The trial court determined that, at the least, the motion and arguments for summary judgment were worth considering. Given that the trial court eventually granted the motion for summary judgment, we conclude that it was not unreasonable to consider the issues raised by the motion and to decide not to strike Wietmarschen's and Crowe's motion and arguments for the summary judgment. It was within the trial court's discretion to determine whether the motion and arguments were insufficient, redundant, or immaterial, and the trial court did not abuse its discretion. Therefore, we overrule assignments two through seven.

{¶11} In assignments eight, nine, and twelve, Lachman argues that the trial court did not properly consider all the federal issues presented by Lachman in his affidavits. In other words, Lachman argues that res judicata should not have applied, and that the grant of summary judgment was improper.

{¶12} We review the grant of summary judgment de novo. Wietmarschen and Crowe were entitled to prevail under Civ.R. 56(C) only if (1)there was no genuine issue of material fact; (2) they were entitled to judgment as a matter of law; and (3) it appeared that reasonable minds could come to but one conclusion when viewing the evidence in favor of the party opposing the motion, and that conclusion was adverse to the party opposing the motion.

{¶13} Under the definition of res judicata, a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. For two suits to be based on the same transaction, they must have a "common nucleus of operative facts." The doctrine applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action (1) to present evidence or grounds or theories of the case not presented in the first action, or (2) to seek

remedies or forms of relief not demanded in the first action. It has long been recognized that the doctrine of res judicata applies in a proper case as between federal court and state court judgments.

{¶14} In 2000, Lachman was improperly joined to the suit in federal court filed by his son, Max, who had been arrested at Lachman's home in 1997. Lachman's suit in state court, while asserting a different cause of action, nonetheless also concerned the arrest of his son by Wietmarschen and Crowe in November 1997. Therefore, both the federal and state suits derived from the same nucleus of operative facts. And, under res judicata, any claims that could have been asserted after a proper joinder in federal court were barred.

{¶15} Lachman's federal suit was dismissed because the statute of limitations had run. The Ohio Supreme Court has held that "a judgment based upon the statute of limitations is generally regarded as on the merits and bars another action for the same cause." This is consistent with the policy basis of res judicata, which is to assure the finality of judicial decisions. Therefore, the trial court properly held that res judicata applied.

{¶16} Even if there were no genuine issues of material fact, such that the trial court could have clearly concluded that Wietmarschen and Crowe were entitled to judgment as a matter of law, the grant of summary judgment was appropriate. Therefore, we overrule errors eight, nine, and twelve.

{¶17} In Lachman's tenth and eleventh assignments of error, he claims that the trial court erred by adopting the magistrate's recommendations. Lachman claims that the trial court did not consider his objections to the magistrate's report, as evidenced first by the fact that the report violated the judge's order of reference, and second by the lack of a detailed statement supporting the violation. Both of these arguments lack merit. As we have already noted, the magistrate's decision was

clearly supported by law. Therefore, it was not error for the trial court to adopt the magistrate's decision. Also, there is no requirement that the trial court verify the findings made by the magistrate, but it is sufficient that the trial court simply order that the magistrate's decision be adopted. Accordingly, Lachman's tenth and eleventh assignments of error are overruled.

Judgment affirmed.
HILDEBRANDT and WINKLER, J.J., concur.

Please Note:
The court has recorded its own entry on the date of the release of this Decision.
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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO
D53123197

EDWARD LACHMAN
Appellant,
Vs
BILL WIETMARSCHEN
Appellee,

APPEAL No. c-020208

ENTRY OVERRULING APPLICATION FOR RECONSIDERATION

This cause came on to be considered upon the PRO SE application of the appellant filed herein for reconsideration and upon the response thereto, and
The Court, upon consideration thereof, finds that the application is not well taken and is overruled.

To The Clerk:
Enter upon the Journal of the Court on 1/10/03 per order of the Court.
By:s/_____ (Copies sent to all counsel)
Presiding Judge

Entered
JAN 10 2003
Image 16
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The Supreme Court of Ohio

FILED
APR 23 2003
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Edward Lachman
Appellant,
Vs
Bill Wietmarschen and C.
Eric Crowe,
Appellees,

Case No. 03-127

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:
Docket Fee, $40,paid by Edward Lachman.

D54530135
Hamilton County Court of Appeals; No. C020208)
s/_____
Thomas J. Moyer
Chief Justice

FILED
2003 MAY -8 A 9:09
GREGORY HARTMANN
CLERK OF COURTS
HAM.CTY.OH

FILED
COURT OF APPEALS
MAY -8 2003
GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
KENNETH J. MURPHY
CLERK
01 JAN 25 PM 4:26
U.S. DISTRICT COURT
SOUNTERN DIST OHIO
WEST DIV CINCINNATI

MAX LACHMAN, et al,
Plaintiff(s),
vs.

HAMILTION COUNTY DEPARTMENT
OF ADULT PROBATION, et al,
Defendant(s).

Case Number: C-1-99-347

Judge 4819
Mag.
Journal /
Issue CMTC
Docketed s/_____

ORDER

This matter is before the court pursuant ot the Order of General Reference in the United States District Court for the Southern District of Ohio Western Division to United States Magistrate Judge Timothy S. Hogan. Pursuant to such reference, the Magistrate Judge reviewed the pleadings and filed with this court on September 25, 2000 Report and Recommendations (Doc. 29). Subsequently, the plaintiffs filed objections to such Report and Recommendations.

The court has reviewed the comprehensive findings of the Magistrate Judge and considered de novo all the filings in this matter. Upon consideration of the foregoing, the court does determine that such Recommendations should be adopted.

IT IS ORDERED that defendants' motion to dismiss plaintiffs' second amended complaint is hereby GRANTED.

IT IS SO ORDERED.

s/_____
Susan J. Dlott
United States District Judge
--

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
KENNETH J. MURPHY
CLERK
00 SEP 25 PM 12:16
U.S. DISTRICT COURT
SOUNTERN DIST OHIO
WEST DIV CINCINNATI

MAX LACHMAN, et al,
Plaintiffs,
vs.
HAMILTION COUNTY DEPARTMENT
OF ADULT PROBATION, et al,
Defendants.

Civil Action No. C-1-99-347

REPORT AND RECOMMENDATION
(Dlott,J.; Hogan,M.J.)

Judge 4819
Mag. 48BE
Journal /
Issue CMTC
Docketed s/_____

This matter is before the court on defendants' motion to dismiss plaintiffs' second amended complaint (Doc. 19), plaintiffs' memorandum in opposition and supplement thereto (Docs. 26, 27), and defendants' reply memorandum. (Doc. 28).

There have been three complaints filed in this case. The original complaint was filed pro se by plaintiff Max Lachman pursuant to 42 U.S.C. §1983. (Doc. 1).

[...]

In the instant case, plaintiffs' second amended complaint adding plaintiff Edward Lachman is clearly the addition of a new party asserting his own causes of action and is barred by the statute of limitations.

[...]

The addition of Eric Crowe, Bill Weit Marschen, Deborah Lahm, and Unknown Hamilton County Deputy Sheriffs as defendants also adds new parties to the second amended complaint and is barred.

[...]

Plaintiffs have failed to satisfy the requirements for the relation back under Fed. R. Civ. P. 15(c)(3). Therefore, the second amended complaint against defendants does not relate back to the date of the original complaint. Under the applicable two year statute of limitations governing section 1983 claims in Ohio, Browning v. Pendelton, 869 F.2d 989, 992 (6th Cir. 1989), the second amended complaint is therefore time-barred and should be dismissed.

To the extent plaintiffs second amended complaint alleges the actions of defendants violate the state law of Ohio, the Court should decline to exercise pendent jurisdiction over such claims. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

IT IS THEREFORE RECOMMENDED THAT:

1. Defendants' motion to dismiss plaintiffs' second amended complaint (Doc. 19) be GRANTED.

Date: September 25, 2000

s/_____

Timothy S. Hogan

United States Magistrate Judge

--

U.S. CONSTITUTIONAL PROVISIONS

The 10th Amendment:
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.

The pertinent part of the 14th Amendment:
nor shall any State...deny to any person within its jurisdiction the equal protection of the laws.

U.S. FEDERAL STATUTES

The pertinent part of 28 U.S.C. §1359 states:
A district court shall not have jurisdiction of a civil action in which any party...has been improperly...joined to invoke the jurisdiction of such court.

The pertinent part of 28 U.S.C. §1257(a) states:
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question...or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution
--

IN THE MUNICIPAL COURT OF
HAMILTON COUNTY, OHIO

EDWARD LACHMAN
Plaintiff
vs.
BILL WIETMARSCHEN C. ERIC CROWE
Defendant.

CASE NO. 01CV29469
Judge ELIZABETH MATTINGLY

JAMES CISSEL, CLERK
HAM.CTY.MUN. COURT
CIVIL DIVISION
JAN 4 3 03 PM '02

MOTION TO STRIKE

The Plaintiff, pursuant to Local Rule V.3, moves this Court as follows:
[...]
6. Motion to strike entirely Defendants' Motion for Summary Judgement as a sham in bad faith in an attempt to defraud this Court.

On page 3 of the Motion for Summary Judgement, Defendants' counsel states:

> "Subsequently on May 14 1999 Plaintiff Edward Lachman and Max Lachman filed a Complaint and Jury Demand in Federal District Court for the Southern District of Ohio naming Bill Wietmarschen and C. Eric Crowe as defendants. (Exhibit 4, Certified Copy of Plaintiff's Second Amended Complaint)."

(This is also Exhibit 2 in Plaintiff's attached Addendum, which is followed by Exhibit 3 -- a notarised, certified copy of the May 14 1999 federal Complaint.)

Counsel perpetrated a blatant, calculated and deliberate fraud on this Court, by trying to substitute the second amended complaint of 13 March 2000 for the original complaint of 14 May 1999, in which neither of the current Defendants is named, nor is the current Plaintiff named, as a party to the original complaint, nor were any of these names added prior to 14 November 1999, when the statute of limitations expired. As such, the District Court properly dismissed, the attempt by the Second Amended Complaint to include those names, as being barred by the 2-year federal

statute of limitations. Counsel admitted to this on page 7:

> "Lachman's initial Section 1983 case was dismissed by the United States District Court because the claims he asserted against Crowe and Wietmarschen were barred by the statute of limitations."

[...]
--

HAMILTON COUNTY MUNICIPAL COURT
CINCINNATI, OHIO

EDWARD LACHMAN
Plaintiff
vs.
BILL WIETMARSCHEN C. ERIC CROWE
Defendant.

CASE NO. 01CV29469
[...]
AFFIDAVIT OF PLAINTIFF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
COUNTY OF HAMILTON
STATE OF OHIO

I, Edward Lachman do solemnly affirm on the basis of personal knowledge, belief, and information:
[...]
9. that I did not join any complaint to a federal civil rights action before the expiration of the associated 2-year statute of limitations on 14 Nov. 1999, nor did I name any of the current Defendants before that time, nor did I seek any common law remedies for trespass on my property in any federal venue.
[...]
JAMES CISSELL, CLERK

HAM. CTY. MUN. COURT
CIVIL DIVISION
JAN 7 3 22 PM '02
[...]
14. that all of the statements above are true and correct to the best of my personal knowledge, information and belief.

s/__(Edward Lachman)__
Affirmed and subscribed before me Dale S. Rose Jr. a notary public in and for the above captioned county and state, this 7th day of January, 2002.
Signature of Notary Public: s/_____
(notarial seal)
DALE S. ROSE JR.
Notary Public - State of Ohio
My Commission Expires
November 23, 2004
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IN THE MUNICIPAL COURT OF
HAMILTON COUNTY, OHIO

EDWARD LACHMAN
Plaintiff
vs.
BILL WIETMARSCHEN C. ERIC CROWE
Defendant.

CASE NO. 01CV29469
Judge ELIZABETH MATTINGLY

VERIFIED MOTION TO SET MAGISTRATE'S ORDER ASIDE

The Plaintiff, pursuant to Civil Rule 53C3b, moves this Court to set aside the Magistrate's Order of 8 January 2002 on the grounds that the Magistrate:

1. failed to conduct, as required by Civ.R. 53E1, "all" procedures necessary, such as those listed in Civ.R.

16(2) & (4) for any "simplification of the issues" or any "necessity of amendments to the pleadings," which could remove defects alleged by Defendants to be in Plaintiff's Complaint, and so allow a subset of issues alleged in the Complaint to proceed to trial. Such procedures are especially necessary in this case, as Plaintiff is not a lawyer, and Plaintiff's own lawyer was unable to take on this case due to academic commitments, and the Magistrate was so informed.

2. excluded Plaintiff's evidence that there were material facts in dispute relating to a trespass action (which is not actionable in federal court, nor was there ever such an action) thereby violating Civ.R. 56C.

3. ignored the fact that Defendant's Counsel submitted a Motion for Summary Judgment after the matter had been scheduled for trial on 9 January 2002, so violating Civ.R. 56B, for which violation Plaintiff moved to strike.

4. will be unable to file a report on "all" issues of law and fact thereby violating the terms of the Order of Reference, as a result of the foregoing defects.

Plaintiff certifies that the above is true or accurate to the best of his knowledge and belief.

Respectfully submitted,
s/_____
Edward Lachman, Plaintiff
87 Juergens Ave.
Cincinnati Ohio 45220
513-861-7748

JAMES CISSEL, CLERK
HAM.CTY.MUN. COURT
CIVIL DIVISION
JAN 18 1 27 PM '02
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IN THE MUNICIPAL COURT OF

HAMILTON COUNTY, OHIO

EDWARD LACHMAN
Plaintiff
vs.
BILL WIETMARSCHEN C. ERIC CROWE
Defendant.

CASE NO. 01CV29469
Judge ELIZABETH MATTINGLY

VERIFIED OBJECTION TO MAGISTRATE'S DECISION, WITH ATTACHED AFFIDAVIT

Pursuant to Civil Rule 52C3, Plaintiff objects to the decision of Magistrate Wolf, which was filed on 8 February 2002 on the following grounds:

1. The Magistrate has erred in interpreting the facts in:

a. stating that "the Complaint in this action has already been litigated in the United States District Court."

The Complaint in this action was not litigated in the United States District Court, as the current trespass Complaint does not make the same pleadings as the federal civil rights' complaint whose lawyer did not plead any issue in district court which could also be litigated as a trespass cause of action in Municipal Court. Moreover, Plaintiff did not commence the original Title 42 Section 1983 complaint filed on 14 May 1999 in district court. Plaintiff's name only appeared on an amended complaint after the statute of limitations had expired on 14 November 1999, as was noted in Magistrate Hogan's decision attached to the Motion for Summary Judgement in this case.

Counsel for the Defendants was guilty of a falsification in the Motion for Summary Judgement by altering the date of an amended federal complaint attached as an Exhibit so as to falsely indicate that Plaintiff was the one to commence the original

complaint in district court on 14 May 1999, rather than Max Lachman by himself as the sole litigant.

The true date of the both the 1st and 2nd amended federal complaints was in each case after the statute of limitations for federal civil rights cases had expired on 14 November 1999, which was the reason given for Magistrate Hogan's decision to bar the Plaintiff from attempting to join along with Max Lachman as a litigant in district court. Said decision is attached to the Motion for Summary Judgement in this case.

In said Motion, it was explicitly stated that Plaintiff did not appeal Magistrate Hogan's decision. Therefore, said decision, which barred Plaintiff from joining Max Lachman as a litigant in a Section 1983 action such that Plaintiff's amended federal complaints were nullified, must be recognised by this Court as a failed attempt to litigate.

[...]

2. The Magistrate has erred in relying on conclusions of law such as:

[...]

b. Plaintiff's current cause of action was identical to the causes of action in U.S. district court

The federal causes of action are not identical to the current trespass cause of action. This is self-evident by comparing the federal amended complaint attached to the Motion for Summary Judgement against the Complaint in this case. Thus, the Magistrate erred for relying on such a conclusion of law.

c. "Edward Lachman is barred from attempting to relitigate his claim in this Court".

Even if the presumptive frauds (of having had standing, permission to join Max Lachman as a litigant, etc.) in Magistrate Wolf's statement were true, Edward Lachman is not barred from attempting to litigate in Municipal Court a prior claim from an abortive attempt, if: the prior claim had been dismissed without prejudice and not in appeal; or the current claim relies on a

mutually exclusive remedy; or the prior claim could not have been heard in the jurisdiction where it had been brought; or the prior claim could not have been heard due to procedural circumstances; or the prior claim was dismissed as a result of an interlocutory judgement; rather than offering the claimant full due process to have his day in court. In all such cases, an attempt to litigate a case is deemed not to be the same as litigation which by definition requires a full and fair hearing on the merits of the claims. (Norwood v. MacDonald, 142 Ohio 299; Goodson v. McDonough, 2 Ohio St. 3d 193.) Any of these conditions holds in the current case: The case in U.S. district court had been dismissed pre-trial by a magistrate without prejudice and so did not reach the merits of the claims and is not in appeal; The current remedy is mutually exclusive to the remedy that had been sought in district court; The current trespass claim in Municipal Court could not have been heard in the jurisdiction of the U.S. district court for southern Ohio; the prior claim could not have been heard due to the procedural circumstance of filing the claim after the federal statute of limitations had expired; the prior claim was dismissed as the result of an interlocutory judgement by a magistrate, instead of a full trial of the merits of the claim in the presence of the Plaintiff in district court before a judge. Thus, the Magistrate erred in issuing this conclusion of law, when she should have held that Edward Lachman may re-attempt to litigate his claim for any of the above-stated reasons, all of which are self-evident from the filings, exhibits and affidavits on the official record for this case up to the day before the hearing.

For the objections shown, Plaintiff objects to the Magistrate's decision and submits that the decision ought to be rejected on the grounds of any one of these objections, and in the interest of substantial justice.

Plaintiff certifies that the above is true or accurate to the best of his knowledge or belief.

Respectfully submitted,
s/_____
Edward Lachman
87 Juergens Ave.
Cincinnati Ohio
14 February 2002

JAMES CISSELL, CLERK
HAM. CTY. MUN. COURT
CIVIL DIVISION
2002 FEB 14 PM 4:00
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OHIO RULES OF CIVIL PROCEDURE

Rule 16. Pretrial Procedure
In any action, the court may schedule one or more conferences before trial to accomplish the following objectives:
[...]
(2) The simplification of the issues;
[...]
(4) The necessity of amendments to the pleadings;
[...]
(10) Other matters as may aid in the disposition of the action.

Rule 53. Referees
[...]
(E) Report
(1) Contents and filing. The referee shall prepare a report upon matters submitted by the order of reference. The referee shall file the report with the clerk of the court and shall mail a copy to the parties.

Supreme Court, U.S.
FILED
AUG 26 2003
OFFICE OF THE CLERK

No. 03-156

In the Supreme Court of the United States

EDWARD LACHMAN,

Petitioner,

v.

BILL WIETERMARSCHEN AND
C. ERIC CROWE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO MUNICIPAL COURT OF HAMILTON COUNTY, OHIO

BRIEF OF RESPONDENTS BILL WIETERMARSCHEN AND C. ERIC CROWE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL K. ALLEN
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

DAVID T. STEVENSON
Counsel of Record
SUSAN MARIE GERTZ
ASSISTANT PROSECUTING ATTORNEYS
230 E. NINTH STREET
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(513) 946-3120

Counsel for Respondents

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. May a person who had been improperly joined to a federal case over which a district court has no personam jurisdiction, be later presumed by a state court to have been a properly joined federal party?

2. May a federal case over which the district court had no personam jurisdiction with regard to improperly joined parties, be later presumed by a state court to have been fully litigated by them for the purpose of deciding res judicata?

3. May a barred person in a federal case for federal statutory claims, who had been barred from joining on grounds of exceeding the statute of limitations, be later barred on grounds of res judicata in a state court after timely filing a common law trespass claim arising out of the same events?

4. When deciding res judicata, may a state court impute subject matter jurisdiction to a federal court where it would not have had any such jurisdiction?

5. May a litigant in propria persona be denied equal protection of federal law when a state court fails to resolve federal issues raised in a timely manner, either by failing to certify those issues with a federal court, or failing to conduct other required procedures sua sponte on its own initiative rather than upon motion?

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JURISDICTION

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule clearly states, in relevant part, "A petition for a writ of certiorari will only be granted for compelling reasons." Respondents further submit that Petitioner's claims do not relate to any of the listed items included in Rule 10 regarding the character of the reasons that this Court would grant a writ of certiorari. As such, the matter herein is not a matter of great legal importance, and there are no compelling reasons to grant the within Petition. Therefore, the writ should be denied.

STATEMENT OF THE CASE

The claims at issue in Edward Lachman's (hereinafter "Petitioner" or "Petitioner Lachman") petition for writ of certiorari herein have already surfaced in a number of courts, both federal and state. They relate, primarily, to the arrest of Petitioner's son, Max Lachman, on November 14, 1997 at Petitioner Lachman's home. Max Lachman had been sentenced to prison prior to 1997, but he was granted judicial release and placed under the supervision of the Adult Probation Department as a condition of a community control sanction (probation) following his release. Due to a probation violation, he was arrested on said date by two Hamilton County, Ohio, Court of Common Pleas adult probation officers, Bill Wietermarschen and C. Eric Crowe, the Respondents herein.

On May 14, 1999, Max Lachman, acting *pro se*, filed a Complaint and Jury Demand in Federal District Court for the Southern District of Ohio, naming as defendants Wietermarschen, Crowe, and the Hamilton County Adult

Probation Department (hereinafter "County Defendants"), and the City of Cincinnati Police Department. While that Complaint contained virtually no factual information, it appeared that Max Lachman took issue with his arrest and the subsequent proceedings regarding the probation violation. That Complaint alleged in its entirety as follows:

> False arrest starting on 14 Nov 97 at the order of the Probation Dep't. and carried out by the Police Dep't. Bodily injury while detained in Justice Center. Malicious Prosecution and Abuse of Process (misinforming witnesses; procuring non-witnesses) by the Prosecutor's Office, leading up to trial on 14 May 98. Lack of medical care throughout.
>
> For these alleged harms Plaintiff prays the Court to "provide restitution for denial/violation of civil rights."

The County Defendants filed their answer on September 22, 1999. On November 5, 1999, attorney Kenneth L. Lawson filed a Notice of Appearance and a Motion to Amend the Complaint. On December 22, 1999, Max Lachman's Motion to Amend the Complaint was granted, and on the same date, he filed his First Amended Complaint. (See Appendix). This pleading purported to name additional "John Doe" defendants of the Cincinnati Police Department and alleged a cause of action in intentional infliction of emotional distress on behalf of Max Lachman's father, Edward Lachman. Id.

The First Amended Complaint did not incorporate the allegations of Max Lachman's *pro se* Complaint and did not contain any allegations of further wrongful activity on the part of the County Defendants. The First Amended Complaint claims in pertinent part:

In addition, the complaint is amended to state: On or about November 14, 1999 [sic], Defendants John Doe 1 and John Doe 2, entered Plaintiff Edward Lachman's home without a warrant, exigent circumstances, or any other legitimate reason, in violation of the 4th Amendment to the United States Constitution.

Defendants John Doe 1 and John Doe 2, were acting under color of state law, and at the direction, acquiesces [sic], and with a custom and police [sic] of Defendant Cincinnati Police Department.

Defendants caused intentional infliction of emotional distress upon Plaintiff Edward Lachman, in defendant's actions of using excessive force and/or unreasonable seizure upon [sic] his son, Max Lachman, in his presence without just cause or a reasonable belief that excessive force and/or unreasonable seizure was necessary. (Emphasis added).

On January 25, 2001, the action of Petitioner Lachman and Max Lachman, as referenced above, was dismissed by District Court Judge Dlott, upon the Report and Recommendation of Magistrate Hogan, as being barred by the applicable statute of limitations. (See Appendix)

Despite the above referenced disposition of the case, which was not appealed, Petitioner Lachman filed yet another Complaint, this time in state court (Hamilton County Municipal Court) on November 21, 2001. Once again, he named Wietermarschen and Crowe as defendants. The allegations, operative set of facts, and claims for relief in that case mirrored those of Petitioner's previously litigated federal

case. Respondents Wietermarschen and Crowe, as the County Defendants in that action, filed a Motion for Summary Judgment in the Municipal Court action on December 18, 2001. Municipal Court Magistrate Wolf heard oral arguments on the County Defendants' Motion and subsequently summarily dismissed Petitioner Lachman's Municipal Court action as being barred by the doctrines of *res judicata* and collateral estoppel. On February 28, 2002, Municipal Court Judge Mattingly approved the decision of Magistrate Wolf ordering summary judgment for the County Defendants, the Respondents herein. (See Appendix)

Petitioner Lachman filed his Notice of Appeal to the Ohio First District Court of Appeals on February 28, 2002. That Court affirmed the decision of the trial court on December 6, 2002. Lachman filed his Notice of Appeal to the Ohio Supreme Court on January 21, 2003, and that Court declined to accept jurisdiction. Petitioner now seeks to have this Court entertain, for the fourth time, the very same claims.

ARGUMENT

I. Introduction.

Petitioner's claims against these Respondents, Wietermarschen and Crowe, were given a full and complete airing in the United States District Court, Southern District of Ohio, Western Division. District Court Judge Dlott ordered that summary judgment be granted to Respondents based on the applicable statute of limitations. No appeal was taken with respect to that decision. Petitioner Lachman's subsequent state claims added nothing new to a cause of action that was originally and properly disposed of in federal District Court. Thus, the current petition, like all of those

actions which preceded it in the Ohio state courts, must fail on based on *res judicata* and collateral estoppel.

II. Petitioner Lachman Is Barred from Attempting to Relitigate His Claims Against These Respondents.

In the case at bar, the doctrines of *res judicata* and/or collateral estoppel continually defeat Petitioner's repeated attempts to relitigate his claims beyond the original federal court action. The doctrine of *res judicata* consists of two related concepts -- claim preclusion and issue preclusion. *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 381, 653 N.E.2d 226 (1995). Claim preclusion provides that, "a valid final judgment, rendered upon the merits, bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject of the previous action." *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* , 81 Ohio St. 3d 392, 395, 692 N.E.2d 140 (1998). Under issue preclusion, "once a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause in the two actions be identical or different." *Id.* The doctrine of *res judicata* requires a party to raise every ground for relief in a first action or be forever barred from asserting it. *Rogers v. Whitehall*, 25 Ohio St. 3d 67, 69, 494 N.E.2d 1387, 1388 (1986); *Zolg v. Hargrave*, 1998 Ohio App. LEXIS 2873 (June 26, 1998), Hamilton App. No. C-970461, unreported (See Appendix). It is well established, then, that a claim litigated in federal district court cannot be relitigated in a state court when the state claim involves an identical cause of action previously litigated and involves the same parties or their privies.; *Rogers v. Whitehall, supra*; *Borowski v. State Chem*

Mfg. Co., 97 Ohio App. 3d 635, 640-641, 647 N.E.2d 230 (1994).

Petitioner Lachman's name appears as a named Plaintiff, in addition to that of Max Lachman, on the First and Second Amended Complaints filed in the United States District Court. (See Appendix) Petitioner Lachman's subsequent actions in state court again assert causes of action surrounding the morning of November 14, 1997. Indeed, even a cursory comparison of each of the federal and state complaints reveals alleged injuries sustained by both Edward and Max Lachman resulting from the events of Max Lachman's arrest on the morning of November 14, 1997. Petitioner Lachman was required to raise every ground for relief in the Complaint or be forever barred from asserting it, but he did not do so. *Rogers, supra.* His additional cause of action, that of common law trespass, pursued in state court, was properly dismissed. (See Appendix)

Summarily, Petitioner Lachman's claims against the County Defendants were given a full and complete airing in federal court, and as such, his present petition for a writ of certiorari should be denied on the basis of *res judicata* and collateral estoppel.

III. Petitioner's Claims Against These Respondents Are Barred by the Applicable Statute of Limitations.

Petitioner Lachman sought, in various courts, to recover for injuries to his person and property in the form of "extreme emotional distress" and as a result of an unlawful seizure of his person and deprivation of liberty through the arrest of his son, Max Lachman. These claims involved allegations of governmental behavior explicitly addressed by the Constitution of the United States, specifically the Fourth,

Eighth, and Fourteenth Amendments -- not under any corresponding theory of state tort law. As such, Lachman did not have a constitutional claim that was separate from his § 1983 claim. *See, Frantz v. Village of Bradford,* 245 F. 3d 869 (6th Cir. 2001). In any event, a claim which may have a longer period of limitation, cannot survive, standing alone, if the essential character of the claim provides a shorter period within which to bring the action. *See, Doe v. First United Methodist Church,* 68 Ohio St.3d 531, 629 N.E.2d 402 (1994); and *Manin v. Diloretti*, 94 Ohio App.3d 777, 641 N.E.2d 826 (1994).

The statute of limitations for 42 U.S.C. § 1983 and for claims of negligence are governed by O.R.C. § 2305.10 which requires that actions for bodily injury be filed within two years of their accrual. *Browning v. Pendleton,* 869 F.2d 989 (6th Cir.1989). Claims arising out of the Ohio Constitution are likewise subject to the two year limit of O.R.C. § 2305.10. *Kotyk v. Rebovich*, 87 Ohio App. 3d 116, 621 N.E.2d 897 (1993). Most importantly, claims against political subdivisions and their employees are governed by the two year statute of limitations found in O.R.C. § 2744.04. *Bojac v. Kutevac,* 64 Ohio App. 3d 368, 581 N.E.2d 625 (1990).

Petitioner Lachman's claims against these Respondents (the County Defendants) were actions against employees of Hamilton County, a political subdivision of the State of Ohio. Lachman sought damages for injuries allegedly caused by acts or omissions to act by employees of Hamilton County performing a governmental function as defined in R.C. § 2744.01. The definition of a "governmental function" under Ohio law is found in O.R.C. § 2744.01(C) which states in pertinent part:

(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

* * *

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.[1]

(2) A "governmental function" includes, but is not limited to, the following:

* * *

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions; . . .
(i) The enforcement or nonperformance of any law; . . .

Lachman did not allege any activity on the part of the County Defendants that did not meet one, or more, of the foregoing definitions. The statute of limitations for those seeking recovery against a political subdivision of the State of Ohio for the performance or nonperformance of a

---

[1] None of the R.C. § 2744.01(G)(2) functions are applicable to County Defendants' conduct in this case.

governmental function is governed by Ohio Revised Code Section 2744.04[2], which provides in part:

> (A) An action against a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought *within two years after the cause of action arose*, or within any applicable shorter period of time for bringing the action provided by the Revised Code. This division applies to actions brought against political subdivisions by all persons, governmental entities, and the state. (Emphasis added).

This section also applies to actions against employees of governmental subdivisions. *Bojac, supra*. As stated therein:

> Appellants argue that appellee was sued individually because, although he was an employee of a political subdivision, he was acting outside the scope of his employment or with malicious purpose, bad faith, or in a wanton or reckless manner within the meaning of R.C. 2744.03(A)(6)(a) and (b). Therefore, appellants claim that, instead of the two-year statute of limitations set forth in R.C. 2744.04 (A) applying, the applicable statute of limitations is four years as set forth in R.C. 2305.09(D).

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[2] This is the pre HB 350 (Tort Reform Act) version.

> Appellants' argument is without merit. It is clear that the statute of limitations for suing a political subdivision is two years. R.C. 2744.04(A). Following appellants' line of reasoning, however, an employee could be sued for an additional two-year period and the employer would have to pay for the defense and reimburse the employee for the judgment if the employee was found to be acting within the scope of his or her duties. See R.C. 2744.01 *et seq.* The legislature could not have intended such a result.

Id. at 371.

Lachman's initial Section 1983 case was dismissed by the District Court because the claims he asserted against the Respondents were barred by the statute of limitations. Suits brought under § 1983, more than two years after the cause of action arose have been characterized as "frivolous." *Nash v. Cuyahoga Metropolitan Housing Authority*, 1999 U.S. App. LEXIS 32519 (6th Cir. 1999). (See Appendix) (Emphasis added). Petitioner Lachman's Amended Complaint in federal court, on its face, was thus barred by the aforementioned statutes of limitation and properly dismissed.

IV. Conclusion

Both federal and state courts have previously, and correctly, dismissed Petitioner Lachman's claims against these Respondents based upon the statutes of limitations and on the well established principles of *res judicata*/and collateral estoppel. In light of the factual and procedural history of Petitioner Lachman's claims relating to the incidents which occurred on November 14, 1997, the applicable legal authority set out herein, and the absence of any compelling reason for this Court to entertain jurisdiction of Petitioner's

claims, the Respondents respectfully request that this Court deny Edward Lachman's Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL K. ALLEN
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

David T. Stevenson
Counsel of Record
Susan Marie Gertz
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230 E. Ninth Street
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FAX: (513) 946-3018

ATTORNEYS FOR
RESPONDENTS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-347
Dlott, J.
Hogan, M.J.

[Dated December, 1999]

Max Lachman,	)
Plaintiff,	)
	)
vs.	)
	)
Hamilton County Dept. of	)
Adult Probation, et al.	)
Defendants.	)
	)

PLAINTIFF'S FIRST AMENDED COMPLAINT

The complaint is amended to add Edward Lachman, 87 Juergens Ave, Cincinnati, Ohio 45220. The complaint is also amended to add Joe Doe 1 and Joe Doe 2 as defendants.

In addition, the complaint is amended to state: On or about November 14, 1999, Defendants John Doe 1 and John Doe 2, entered Plaintiff Edward Lachman's home without a warrant, extingent circumstances, or any other legitimate

reason, in violation of the 4th Amendment to the United States Constitution.

Defendants John Doe 1 and John Doe 2, were acting under color of state law, and at the direction, acquiesces, and with a custom and police of Defendant Cincinnati Police Department.

Defendants caused intentional infliction of emotional distress upon Plaintiff Edward Lachman, in defendants' actions of using excessive force and/or unreasonable seizure upon his son, Max Lachman, in his presence without just cause or a reasonable belief that excessive force and/or unreasonable seizure was necessary.

Respectfully submitted,

/s/ _____

Kenneth L. Lawson (0042468)
Kenneth L. Lawson & Associates
1014 Vine Street, Suite 1575
Cincinnati, Ohio 45202

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-347

District Judge Susan J. Dlott

MAX LACHMAN, et al.,
Plaintiff(s)

v.

HAMILTON COUNTY DEPARTMENT OF ADULT PROBATION, et al.,
Defendant(s)

ORDER

The Court has reviewed the Report and Recommendations of the United States Magistrate Judge (Doc. 20), to whom this case was referred pursuant to 28 U.S.C. §636(b), and noting that no objections have been filed thereto and that the time for filing such objections under Fed. R. Civ. P. 72(b) expired April 24, 2000, hereby ADOPTS said Report and Recommendations.

It is therefore ORDERED that:

1. Defendant City of Cincinnati Police Division's motion to dismiss (Doc. 4) is hereby DENIED AS MOOT;

2. Defendants Hamilton County Department of Adult Probation, Hamilton County Prosecutor's Office and Hamilton County Justice Center's motion for summary judgment (Doc. 12) is hereby DENIED AS MOOT;

3. The defendants Hamilton County Prosecutor's Office, the Hamilton County Justice Center, the Hamilton County Department of Adult Probation, and the City of Cincinnati Police Department are hereby DISMISSED as defendants in this matter;

4. The remaining defendants in this matter are C. Eric Crowe, Bill Weitmarschen, Deborah Lahm, and Unknown Hamilton County Deputy Sheriffs.

IT IS SO ORDERED.

/s/ _____
Susan J. Dlott
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-347

(Dlott, J.; Hogan, M.J.)

Max Lachman, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
Hamilton County	)
Department of Adult	)
Probation, et al.,	)
Defendants.	)
	)

NOTICE

Attached hereto is the Report and Recommended decision of the Honorable Timothy S. Hogan, United States Magistrate Judge, which was filed on 4/5/00. Any party may object to the Magistrate's findings, recommendations, and report within (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters,* 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all Parties, the Judge, and the Magistrate, a written Motion to Review which shall specifically identify

the portions of the proposed findings, recommendations, or report to which objection is made along with a memorandum of law setting forth the basis for such objection, (such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate's Findings, Recommendations and Report, all other parties shall respond to said Motion to Review within ten (10) days after being served a copy thereof.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-99-347

[Filed April 5, 2000]

Max Lachman, et al.,	)
Plaintiffs,	)
	)
vs.	)
	)
Hamilton County	)
Department of Adult	)
Probation, et al.,	)
Defendants.	)
	)

REPORT AND RECOMMENDATION
(Dlott, J.; Hogan, M.J.)

This 42 U.S.C. § 1983 action was initially filed pro se by plaintiff Max Lachman. (Doc. 1). The original complaint named the Hamilton County, Ohio Prosecutor's Office, the Hamilton County Justice Center, the Hamilton County Department of Adult Probation, and the City of Cincinnati Police Department as defendants. (Doc. 1). On November 5, 1999, counsel entered an appearance on behalf of plaintiff Max Lachman. (Doc. 7). On December 22, 1999, an amended complaint was filed adding plaintiff Edward Lachman, the father of Max Lachman, and John Does 1 and 2 as defendants in this action. (Doc. 10). The undersigned issued a Report and Recommendation recommending that

defendant City of Cincinnati Police Division's[1] motion to dismiss be granted. (Doc. 11). Upon review, the Court declined to adopt the Report and Recommendation and ordered plaintiffs to amend their complaint and file their response to defendant City of Cincinnati Police Division's motion to dismiss no later than March 13, 2000. (Doc. 15).

This matter is before the Court on defendant City of Cincinnati Police Division's motion to dismiss (Doc. 4), the motion for summary judgment on behalf of defendants Hamilton County Department of Adult Probation, Hamilton County Prosecutor's Office, and the Hamilton County Justice Center (Doc. 12), plaintiffs' memorandum in opposition to the motions to dismiss and for summary judgment (Doc. 17), and the County defendants' reply memorandum. (Doc. 18).

Plaintiffs filed a second amended complaint in this matter on March 13, 2000. (Doc. 16). Plaintiffs' second amended complaint names as defendants Cincinnati Police Offfcers C, Eric Crowe and Bill Weitmarschen; Deborah Lahm, a probation officer with the Hamilton County Probation Department; and Unknown Hamilton County Deputy Sheriffs. Defendants Crowe, Weitmarschen, and Unknown Hamilton County Deputy Sheriffs are named in their individual capacities for money damages and their official capacities for injunctive and declaratory relief. Defendant Lahm is named in her individual capacity only.

The second amended complaint alleges that on or about November 14, 1997, defendant Lahm approved Max Lachman leaving the Crisis Center with Edward Lachman.

---

[1] The City of Cincinnati Police Division is denominated as the City of Cincinnati Police Department in the complaint.

Plaintiffs allege that Lahrn's approval was either negligently communicated or Lahm negligently failed to obtain all relevant information from the Crisis Center that would assure Max Lachman's departure and stay with Edward Lachman would be peaceful and fruitful. (Doc. 16, ¶¶1-2).

The second amended complaint further alleges that on or about November 14, 1997, defendants Crowe and Weitmarschen entered Edward Lachman's home without a warrant, extenuating circumstances, or any other legitimate reason. Crowe and Weitmarschen arrested Max Laehman, using excessive force in the process. Plaintiffs claim that such force caused Max Laehrnan physical and emotional injury. Plaintiffs allege that the police officers entered Edward Lachman's home without a warrant and used excessive force at the direction, acquiescence, and with the custom and policy of the Cincinnati Police Division. (Doc. 16, ¶3-5). Plaintiffs further allege that defendants Crowe and Weitmarschen caused intentional infliction of emotional distress upon plaintiff Edward Lachman in their use of excessive force and/or unreasonable seizure of his son Max Lachman. (Doc. 16, ¶6).

The second amended complaint also alleges that plaintiff Max Lachnaan was thereafter transported to the Hamilton County Justice Center where unknown Hamilton County deputy sheriffs placed him in solitary confinement while he was handcuffed. Plaintiffs allege that the handcuffs caused lacerations and injury to Max Lachman and that the unknown deputies refused to remove the handcuffs from his wrists. Plaintiffs allege that upon belief and information, defendants have a custom and policy of keeping prisoners handcuffed while confined in solitary confinement. (Doc. 16, ¶7).

I. Defendant City of Cincinnati Police Division's Motion to Dismiss Should be Denied.

The motion to dismiss by City of Cincinnati Police Division seeks a dismissal based on the original complaint. Plaintiffs' second amended complaint does not name the City of Cincinnati Police Division as a defendant in this matter. Plaintiffs' second amended complaint supersedes the original and amended complaints which are treated as nonexistent. *See Klyce v. Ramirez,* 852 F.2d 568 (6th Cir. 1988)(unpublished), 1988 W.L. 74155, *3, citing *Bullen v. B. De Bretteville Treasure Co.,* 239 F.2d 824, 833 (9th Cir. 1956), *cert. denied,* 353 U.S. 947 (1957). *See also Clark v. Tarrant County,* 798 F.2d 736, 740-41 (5th Cir. 1986);*Fritz v. Standard Sec. Life Ins. Co.,* 676 F.2d 1356, 1358 (11th Cir. 1982); *Morrow v. South,* 540 F. Supp. 1104, 1113-14 (S.D. Ohio 1982)(Rice, J.); *Podlesnick v. Airborne Exp., Inc.,* 94 F.R.D. 288, 291 (S.D. Ohio 1982)(Rice, J.). Thus, defendant City of Cincinnati Police Division's motion to dismiss should be denied as moot.

II. The County Defendants' Motion for Summary Judgment Should be Denied.

The County defendants' motion for summary judgment was filed on February 18, 2000, prior to the filing of the second amended complaint in this case. (Doc. 12). Thus, the arguments and grounds for the motion are directed toward the original and first amended complaints. As explained above, the second amended complaint supersedes the original and first amended complaints. The original and first amended complaints serve no function in this case and any subsequent motion made by defendants should be directed at the second amended complaint. 6 C. Wright, A. Miller & M, Kane, Federal Practice and Procedure ¶ 1476 (2d ed.

1990)(foomotes omitted). However, defendants should not be required to file a new motion for summary judgment simply because a second amended complaint was introduced while their motion was pending. "If some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading." *Id.*

The contentions presented in the County defendants' motion for summary judgment are not germane to the second amended complaint. While the Hamilton County Justice Center, the Hamilton County Adult Probation Department, and the Hamilton County Prosecutor's Office are named as defendants in the original complaint, they are not named as defendants in the second amended complaint. (Doc. 12 at 8-9). Nor are the claims raised in the original pro se complaint the same as those raised in the second amended complaint. Unlike the original complaint, the second amended complaint does not allege a claim for "false arrest at the order of the Probation Department" or "malicious prosecution and abuse of process" on the part of the County Prosecutor's Office. (Doc. 1 at 5). Therefore, the immunity arguments advanced by defendants Hamilton County Adult Probation Department and Hamilton County Prosecutor's Office (Doc. 12 at 5-7, 8-9) are not applicable to the second amended complaint.

Likewise, the alleged deficiencies in the original complaint concerning the treatment plaintiff Max Lachman received while at the Hamilton County Justice Center (Doc. 12 at 7-9) were cured by the second amended complaint. The second amended complaint alleges facts which, if true, state a claim for a violation of plaintiff's Fourteenth Amendment rights against defendants unknown deputy sheriffs. *See Bell v. Wolfish,* 441 U.S. 520, 535 (1979).

For these reasons, the County defendants' motion for summary judgment should be denied as moot.

III. The Statute of Limitations Defense Raised in Defendants' Reply Brief Should be Raised by a Separate Motion Directed to the Second Amended Complaint.

In their reply brief, the County defendants argue that the "claims against the named and unidentified individual defendants asserted in plaintiffs' Second Amended Complaint are likely barred by the appropriate statute of limitations." (Doc. 18 at 4). Because the Hamilton County Justice Center, the Hamilton County Adult Probation Department, and the Hamilton County Prosecutor's Office are no longer defendants in this action, any potential defenses possessed by the individual defendants named in the second complaint should be raised by those defendants. Therefore, the Court declines to address the issue of the statute of limitations at this time.

IT IS THEREFORE RECOMMENDED THAT:

1. Defendant City of Cincinnati Police Division's motion to dismiss (Doc. 4) be **DENIED** as moot.

2. The motion for summary judgment on behalf of defendants Hamilton County Department of Adult Probation, Hamilton County Prosecutor's Office, and the Hamilton County Justice Center (Doc. 12) be **DENIED** as moot.

3. If these recommendations are adopted by the Court, the Court should issue an Order:

a. Dismissing the Hamilton County Prosecutor's Office,

the Hamilton County Justice Center, the Hamilton County Department of Adult Probation, and the City of Cincinnati Police Department as defendants in this matter; and

b. Clarifying that the remaining defendants in this matter are C. Eric Crowe, Bill Weitmarschen, Deborah Lahm, and Unknown Hamilton County Deputy Sheriffs.

Date: April 4, 2000 /s/ _____
Timothy S. Hogan
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-99-347

(Judge Dlott)
(Mag. Judge Hogan)

[Filed March 13, 2000]

Max Lachman	)
87 Guergens	)
Cincinnati, Ohio 45220	)
	)
and	)
	)
Edward Lachman	)
87 Guergens	)
Cincinnati, Ohio 45220	)
	)
Plaintiff,	)
	)
vs.	)
	)
C. Eric Crowe	)
Cincinnati Police Division	)
310 Ezzard Charles	)
Cincinnati, Ohio 45214	)

and)
)
Bill Weit Marschen)
Cincinnati Police Division)
310 Ezzard Charles)
Cincinnati, Ohio 45214)
)
and)
)
Deborah Lahm)
Adult Probation Department)
800 Broadway)
Cincinnati, Ohio 45202)
)
and)
)
Unknown Hamilton County)
Deputy Sheriffs)
Hamilton County Justice Center)
900 Sycamore Street)
Cincinnati, Ohio 45202)
)
Defendants.)
_____)

SECOND AMENDED C0MPLAINT
(Jury Demand Endorsed Hereon)

I. Complaint

1. On or about November 14, 1997, Defendant Lahm approved Plaintiff Max Lachman leaving the Crisis Center with Plaintiff Edward Lachman.

2. Defendant Lahm's approval was either negligently communicated or Defendant negligently failed to obtain all relevant information from the Crisis Center that would have assured that Plaintiff Max Lachman's departure and stay with Plaintiff Edward Lachman would have been a peaceful and fruitful stay.

3. On or about November 14, 1997, Defendants Crowe and Marschen entered Plaintiff Edward Lachman's home without a warrant, extenuating circumstances, or any other legitimate reason, in violation of the Fourth Amendment to the United States Constitution.

4. Defendants Crowe and Marschen arrested, apprehended, and used excessive force upon Plaintiff Max Lachman, causing him injury to body and mind.

5. Defendants Crowe and Marschen were acting under color of state law, and at the direction, acquiescence, and with the custom and policy of the Cincinnati Police Division in entering said home without a warrant and using excessive force upon a citizen.

6. Defendants Crowe and Marschen caused intentional infliction of emotional distress upon Plaintiff Edward Lachman, in Defendants' action of using excessive force and/or unreasonable seizure of his son, Plaintiff Max Lachman, in their presence without just cause or a reasonable belief that excessive force and/or unreasonable seizure was necessary.

7. Defendants Crowe and Marschen transported Plaintiff Max Lachman to the Hamilton County Justice Center on November 14, 1997. While at the Hamilton County Justice Center, unknown Hamilton County deputy sheriff defendants,

placed Plaintiff Max Lachman into the solitary confinement cell while handcuffed. Said handcuffs caused lacerations and injury to Plaintiff Lachman wrists, to the point of bleeding and said unknown deputies refused to remove said handcuffs. Upon belief and information, Defendants have a custom and policy of keeping prisoners handcuffed while confined in solitary confinement.

II. Jurisdictional Statement

8. This action is brought pursuant to 42 U.S.C. § 1983 and state law. The Court has jurisdiction pursuant to 18 U.S.C. §1331 and 28 U.S.C. §1367 for those claims brought under state law. Venue is pursuant to 28 U.S.C. § 1391.

III. Parties

9. Plaintiff Max Lachman is a citizen of the United States of American in Hamilton County, Ohio. The laws governing Hamilton County and the United States Constitution protect him. As a proximate cause and result of Defendants" actions, he received substantial injury and financial loss.

10. Plaintiff Edward Lachman is the father of Plaintiff Max Lachman. He is a citizen of Hamilton County, Ohio and the United States of America, and as such, he is entitled to the protection of the laws of Hamilton County, United States Constitution. As the proximate cause and result of Defendants' actions, he received substantial injury and financial loss.

11. Defendant C. Eric Crowe is a Cincinnati Police Officer sworn to uphold the law. He is being sued in his official and individual capacities.

12. Defendant Bill Welt Marschen is a Cincinnati Police Officer, and as such, he is responsible to uphold the laws of the State of Ohio and the United States. He is being sued in his official and individual capacities.

13. Defendant Deborah Lahm is a probation Officer with the Hamilton County Probation Department. As such, she is responsible for upholding the laws of the State of Ohio and the United States constitution. She is being sued in her individual capacity only.

14. Defendants Unknown Deputy Sheriffs are law enforcement officers who have a duty to uphold the laws of the State of Ohio and the United States Constitution. At all times relevant to this actions, Defendants were working in their capacities as correctional personnel in the Hamilton County Justice Center. Defendants are being sued in both their individual and official capacities.

FIRST CAUSE OF ACTION

15. Defendants Crowe's and Marschen's actions of entering Plaintiff Edward Lachman's home without a warrant, extenuating circumstances, or any other legitimate reason, violated both Plaintiffs' Fourth Amendment rights to the United States Constitution.

SECOND CAUSE OF ACTION

16. Defendants Crowe's and Merschen's arrest, apprehension, and use of excessive force upon Plaintiff Max Lachman was in violation of the Fourth Amendment to the United States Constitution.

THIRD CAUSE OF ACTION

17. Defendants Crowe's and Merschen's actions of using excessive force in causing an unreasonable seizure upon Plaintiff Max Lachman violated Plaintiff Edward Lachman's right to be free from intentional infliction of emotional distress.

FOURTH CAUSE OF ACTION

18. Defendant Unknown Deputy Sheriff's actions of placing Plaintiff Max Lachman into a solitary confinement cell with tightened handcuffs that cause injury to Plaintiff, violated Plaintiff's Fourteenth Amendment right to the United States Constitution.

FIFTH CAUSE OF ACTION

19. Defendant Deborah Lahm's action of negligently communicating or negligently failing to obtain relevant information from the Crisis Center, was the proximate cause of initial injury caused to both Plaintiffs and her actions constitutes negligence.

PRAYER OF RELIEF

Plaintiffs request this Court to;

(A) Declare Defendants' actions unconstitutional;

(B) Enjoin Defendants in their official capacity from placing handcuffs on arrestees or suspects that are too tight and from failing loosen said cuffs when they are found to be too tight;

(C) Award Plaintiffs compensatory damages in an amount to be determined at trial against each Defendant in their individual capacities;

(D) Award Plaintiffs attorney fees from each Defendant in their individual capacities;

(E) Any other relief that this Court deems fit.

Respectfully submitted,

/s/ _____

Kenneth L. Lawson (0042468)
Kenneth L. Lawson & Associates
1014 Vine Street, Suite 1575
Cincinnati, Ohio 45202
Telephone: (513) 345-5000
Telecopier: (513) 345-5005

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon Michael J. Harmon, Assistant City Solicitor, City of Cincinnati, Room 214, City Hall, 801 Plum Street, Cincinnati, Ohio 45202 and David T. Stevenson and Monica M. Saba, Assistant Prosecuting Attorneys, Civil Division, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202 by regular U.S. Mail on this 13th day of March, 2000.

/s/ _____

Kenneth L. Lawson

APPENDIX E

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

CASE NUMBER: 01 CV 29469

[Dated February 5, 2002]

EDWARD LACHMAN	)
PLAINTIFF,	)
	)
vs.	)
	)
BILL WIETMARSCHEN	)
C. ERIC CROWE	)
DEFENDANT.	)
	)

MAGISTRATE'S DECISION

This cause came to be heard on the defendant's Motion for Summary Judgment on the 8th day of January, 2002, in the Civil Division of the Hamilton County Municipal Court. Both parties were present and presented arguments on the Motion.

The complaint in this action has already been litigated in the United States District Court. This is clearly set forth in the defendant's Motion for Summary Judgment and copies of the prior complaint and decision by Magistrate Hogan are attached. In this hearing the plaintiff argued that he was not

a party to the action in Federal Court, however, a copy of the prior complaint demonstrated that Edward Lachman was a party in the prior case. Therefore, Edward Lachman is barred from attempting to relitigate his claim in this Court.

I therefore recommend defendant's Motion for Summary Judgment is granted.

Copies of this decision have been mailed to the parties or their counsel. Unless written objections to this decision are filed and served within 14 days of the date of its filing, the decision may become the order of the Court.

/s/ _____

Ellen T. Wolf, Magistrate
Hamilton County Municipal Court
February 5, 2002

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

CASE NUMBER: 01 CV 29469

EDWARD LACHMAN	)
	)
vs.	)
	)
BILL WIETMARSCHEN	)
C. ERIC CROWE	)
	)

Upon consideration of the Motion, Memorandum in Opposition to the Arguments of the parties, the Court finds that Defendants' Motion for Summary Judgment is well taken. Case dismissed.

/s/ _____
Magistrate

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

CASE NUMBER: 01 CV 29469

[Dated February 27, 2002]

EDWARD LACHMAN	)
PLAINTIFF,	)
	)
vs.	)
	)
BILL WIETMARSCHEN	)
C. ERIC CROWE	)
DEFENDANT.	)
	)

ENTRY OVERRULING OBJECTIONS TO THE DECISION OF THE MAGISTRATE AND APPROVING THE DECISION OF THE MAGISTRATE

ORDERED that the Decision of the Magistrate be approved; that the findings of the fact set forth therein are adopted as the findings of fact of the Court; and that the recommendations contained therein are adopted as the order of the Court.

/s/ _____
JUDGE MUNICIPAL COURT

2-27-02
DATE

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

CASE NUMBER: 01 CV 29469

[Dated February 28, 2002]

EDWARD LACHMAN	)
Plaintiff(s),	)
	)
vs.	)
	)
BILL WIETMARSCHEN	)
C. ERIC CROWE	)
Defendant(s)	)
	)

JUDGMENT ENTRY

[X] The objections to the Magistrate's decision are overruled (*Check if applicable*)

[X] The decision of the Magistrate is adopted and judgment is hereby rendered as follows:
(*Restate the recommended judgment*)

Defendant's Motion for Summary Judgment is granted.

/s/ _____
Judge of the Hamilton County Municipal Court

2-28-02
DATE

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-3056

[Filed December 10, 1999]

TIMOTHY M. NASH,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CUYAHOGA METROPOLITAN	)
HOUSING AUTHORITY,	)
Defendant-Appellee.	)
	)

Northern District of Ohio
98-02145
Nugent
12-4-98

JUDGES: Before JONES, BATCHELDER, and MOORE, Circuit Judges.

ORDER

Timothy M. Nash, proceeding pro se and in forma pauperis, appeals a district court judgment that dismissed his suit as frivolous pursuant to 28 U.S.C. § 1915(e). The case

has been referred to this panel pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, we unanimously agree that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Seeking monetary relief only, Nash filed a 42 U.S.C. § 1983 suit against the "Cuyahoga Metropolitan Housing Authorities Carver Park Estates" on September 10, 1998. Nash proceeded in forma pauperis. Nash claimed that the defendant unlawfully evicted him after police officers searched his home based on false allegations of drug trafficking on June 23, 1994.

The district court dismissed the suit as frivolous, concluding that it was barred by Ohio's two-year statute of limitations applicable to § 1983 suits and that the suit was frivolous on the merits.

In his timely appeal, Nash reasserts the claims he made in his complaint and argues that a four-year statute of limitations should have been applied to his claims.

The district court properly dismissed Nash's suit as frivolous. We review de novo a dismissal of an in forma pauperis complaint as frivolous under § 1915(e)(2)(B). *See McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997); *cf. Benson v. O'Brian*, 179 F.3d 1014, 1017 (6th Cir. 1999) (§ 1915(e) may not be applied to a fee-paid suit). A district court properly dismisses a complaint as frivolous when the plaintiff fails to present any claim with an arguable or rational basis in law or fact. *See Neitzke v. Williams*, 490 U.S. 319, 325, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989).

Nash's suit was legally frivolous because it was barred by the applicable statute of limitations. Section 1983 civil rights

actions arising in Ohio must be filed within two years after their accrual. *See Thomas v. Shipka*, 872 F.2d 772, 772-73 (6th Cir. 1989); *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989) (en banc). Nash's claim that a four-year limitations period should have applied is meritless. *See Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 519 (6th Cir. 1997). Nash's cause of action accrued in 1994, when the defendant evicted him following the search of his home because of suspected drug activity. A cause of action accrues and begins to run when the plaintiff knows or has reason to know of the injury that is the basis of his action. *See Friedman v. Estate of Presser*, 929 F.2d 1151, 1159 (6th Cir. 1991). Because Nash did not file his suit within two years after the action accrued, his § 1983 suit was time-barred.

The district court did not err in dismissing Nash's suit as frivolous. Accordingly, we affirm the district court's judgment for the reasons set forth in the district court's opinion and order entered on November 5, 1998. *See* Rule 34(j)(2)(C). Rules of the Sixth Circuit.

APPENDIX G

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

APPEAL No. C-970461

[Filed June 26, 1998]

DANIEL ZOLG,
Plaintiff-Appellant,

v.

RICHARD HARGRAVE,
Defendant-Appellee.

1998 Ohio App. LEXIS 2873
TRIAL NO. A-9604110

MEMORANDUM DECISION AND JUDGMENT ENTRY

Per Curiam

The issue in this case is whether the Hamilton County Court of Common Pleas was correct when it granted summary judgment in favor of defendant-appellee, Richard Hargrave. The trial court applied the doctrines of collateral estoppel and

res judicata and thus determined that plaintiff-appellant, Daniel Zolg, was barred from bringing an action in which he asserted claims of negligence and breach of contract against Hargrave. We conclude that the trial court was correct in its ruling for the following reasons.

The facts of this case are not in dispute, as they were previously established during an interpleader action in the United States District Court for the Southern District of Ohio.[1] Zolg was the business partner of Richard Hertel. Blanche Hertel is Richard's mother. In 1985 and 1988, New England Mutual Life ("NEML") issued two life insurance policies on Richard's life. Hargrave was the insurance agent who sold Richard the policies. In 1993, when Richard learned that he was terminally ill with cancer, he contacted Hargrave in order to execute a new designation-of-beneficiary form.

Both Zolg and Hargrave maintained in the federal interpleader action that Richard's intent was to designate Zolg as the primary beneficiary of the NEML policies, and his parents, William and Blanche Hertel, together, as secondary beneficiaries.[2] The designation form did not contain separate spaces for primary and secondary beneficiaries. When Hargrave completed the forms, he placed a circled "1" by Zolg's name and a circled "2" by the Hertels' names. The form was signed and sent to NEML's home office. When the form was processed there, Zolg and the Hertels were listed as equal co-beneficiaries. NEML returned copies of the processed forms to Hargrave, but he failed to notice the equal

---

[1] *New England Mutual Life Ins. Co. v. Zolg* (1996), S.D. Ohio No. C 01-94-059, unreported.

[2] William Hertel predeceased Richard.

beneficiary designation.

Richard died in September of 1993. Zolg made a claim for the proceeds of Richard's life insurance policies, and Blanche Hertel made a claim for one-half of those proceeds. Accordingly, NEML initiated the interpleader action, deposited the insurance proceeds with the district court, and requested that Zolg and Blanche Hertel litigate the matter as to who should prevail.

Zolg counterclaimed for reformation of the beneficiary form. Zolg reasoned that the court should reform Richard's beneficiary designation because NEML had been negligent in processing the form, and that its negligence served to compound Hargrave's error.[3] Zolg also sought $ 10,000 damages on his negligence claim.

Both Zolg and NEML moved for summary judgment. The district court dismissed NEML from the action and permanently enjoined Zolg and Blanche Hertel from instituting any action in regard to the proceeds of Richard's insurance policies. The court further ordered that resolution of Zolg's negligence counterclaim be stayed pending the resolution of Zolg's and Blanche Hertel's claims to the insurance proceeds themselves.

The parties consented to a bench trial of the interpleader action before a district court magistrate, and the case was tried on January 16, 1996. Following that trial, the court ruled that Zolg and Blanche Hertel were to share the

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[3] Zolg also alleged that Hargrave was NEML's agent within the pleadings filed in federal district court.

insurance proceeds equally. In arriving at this judgment, the magistrate specifically found the following:

> the beneficiary designation form was executed by [Richard] with the knowledge that both he and his father, William Hertel, were suffering from terminal illness. There is credible evidence upon which the Court concludes that [Richard's] intent was to ensure that both his parents and Daniel Zolg were "taken care of" in the event of his death. Notwithstanding such a conclusion, Zolg fails to present clear and convincing evidence that the [beneficiary designation] form, as written, constitutes a mutual or unilateral mistake and that [Richard's] intent was other than that expressed by the form. For the foregoing reasons, the Court declines to reform the beneficiary designations applicable to [Richard's] insurance policies as established by the April 1993 beneficiary designation form.

On July 23, 1996, Zolg initiated this action, sounding in tort and contract, against Hargrave. Zolg alleged that, because of Hargrave's negligence, he was denied the entire proceeds of Richard's insurance policies. Zolg amended his complaint to allege further that he was the third-party beneficiary of an oral contract between Richard and Hargrave. Thereafter, Zolg and Hargrave filed motions for summary judgment. The trial court granted Hargrave's motion while denying Zolg's motion.

From that judgment, Zolg brings this timely appeal in which he asserts three assignments of error. We turn first to Zolg's second assignment of error, in which he urges that the lower court erred when it granted Hargrave's motion for summary judgment on the basis of *res judicata*.

It has long been the law of Ohio that a final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.[4] Further, an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in the first lawsuit. The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or to be forever barred from asserting it.[5] This rule "encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes."[6]

More recently, the Supreme Court of Ohio held:

> [A] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. (Paragraph two of the syllabus of *Norwood v. McDonald* [1943], 142 Ohio St. 299, 27 Ohio Op. 240, 52 N.E.2d 67, overruled; paragraph two of the syllabus of *Whitehead v. Gen. Tel. Co.* [1969], 20 Ohio St. 2d 108, 49 Ohio

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[4] *Norwood v. McDonald* (1943), 142 Ohio St. 299, 52 N.E.2d 67, paragraph one of the syllabus.

[5] *National Amusements, Inc. v. Springdale* (1990), 53 Ohio St. 3d 60, 62, 558 N.E.2d 1178, 1180.

[6] *Id.* at 62, 558 N.E.2d at 1180 (citing *Brown v. Felsen* [1979], 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767).

Op. 2d 435, 254 N.E.2d 10, overruled to the extent inconsistent herewith; paragraph one of the syllabus of *Norwood, supra,* and paragraph one of the syllabus of *Whitehead, supra,* modified; 1 Restatement of the Law 2d, Judgments [1982], Sections 24-25, approved and adopted.).[7]

We have set forth the procedural posture of the federal action, which included Zolg's negligence counterclaim against NEML. While Hargrave was not named as a party by any of the litigants, he was a witness in that action and was obviously subject to process. More importantly, Zolg's counterclaim was predicated upon his allegation that Hargrave, as the agent of NEML, erroneously prepared the beneficiary designation forms by naming Zolg and Blanche Hertel as co-beneficiaries.[8] Based upon the above authority, we hold that Zolg's current claims against Hargrave are barred by the doctrine of *res judicata* as they could have been litigated in the federal action.

Further, Zolg argues that there was no mutuality of parties in this action and in the action in federal court because Hargrave was not in privity with NEML in the federal action. He contends that this bars the application of the doctrine of *res judicata*. This argument lacks merit. Zolg's argument is completely contrary to his position in federal court and is, in effect, an alternate legal theory for relief. Accordingly, he is

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[7] *Grava v. Parkman Twp.* (1997), 73 Ohio St. 3d 379, 653 N.E.2d 226, syllabus.

[8] T.d. 10, tab 19, at 3-5.

now barred from asserting it.[9]

Zolg also contends that he was not required to join Hargrave in the federal action because Hargrave was a joint tortfeasor with NEML, and because joint tortfeasors may be sued in succession until a judgment is satisfied.[10] However, in the case at bar, no newfacts, additional injuries or independent acts of negligence were alleged. Based upon the action in federal district court, there were no ambivalent issues remaining. Additionally, this argument fails because NEML prevailed on Zolg's negligence claim and there is no judgment to be satisfied.

Accordingly, Zolg's second assignment of error is overruled.

In his first assignment of error, Zolg contends that the lower court erred by granting Hargrave's motion for summary judgment on the basis of the doctrine of collateral estoppel. Zolg's third and final assignment of error assails the trial court's denial of his own motion for summary judgment. We find these assignments to be subsumed in our disposition of the second assignment of error. They are, accordingly, overruled.

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[9] The Ohio Supreme Court explained in *Grava, supra*, at 382, 653 N.E.2d 226, 228-229, that the application of the doctrine of *res judicata* is not limited to "only those subsequent actions involving the same legal theory of recovery as a previous action."

[10] Zolg relies upon *McCrory v. Children's Hosp.* (1986), 28 Ohio App. 3d 49, 501 N.E.2d 1238, for the proposition that a joint tortfeasor can be held responsible for independent acts of negligence and additional injuries.

For the foregoing reasons, the judgment of the court of common pleas is affirmed. And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty. It is further Ordered that costs be taxed in compliance with App.R. 24, that a copy of this Memorandum Decision and Judgment Entry shall constitute the mandate, and that said mandate shall be sent to the trial court for execution pursuant to App.R. 27.

Judgment affirmed.

SUNDERMANN, P.J., DOAN and HILDEBRANDT, JJ.